

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. DAVIS

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STATE OF NEBRASKA, APPELLEE,
V.
DARIUS DAVIS, APPELLANT.

Filed June 5, 2012. No. A-11-944.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Darius Davis, pro se.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Darius Davis appeals from the Douglas County District Court's denial of his motion for postconviction relief without an evidentiary hearing. For the reasons set forth herein, we affirm.

II. STATEMENT OF FACTS

In 2010, Davis was charged with terroristic threats and first degree domestic assault. Pursuant to a plea agreement, Davis pled no contest to first degree domestic assault and the State dismissed the terroristic threats charge and a misdemeanor domestic assault case that was pending in county court. At the plea hearing, at which Davis appeared with his counsel, the district court advised Davis of his rights, the nature of the charge, and the possible penalties. During the plea hearing, the following exchange occurred between the trial court and Davis:

THE COURT: Okay. All right. . . . I need to ask you a series of questions, the purpose of which is to make sure that you understand that you have certain constitutional rights available to you in this matter, and by offering a plea, if I accept it, you're going to be giving up many of those rights. I also need to determine that any plea that you're

making is being made freely, knowingly and voluntarily, and you're, in fact, guilty of the charge.

So as we go through this process, if there are any questions that you have, please ask me to clarify anything you don't understand. And if you wish to speak privately with [defense counsel], you're entitled to do so. Do you understand that, sir?

[Davis]: Yes, sir.

....

THE COURT: Before I can accept that plea, I need to be certain that you understand the specific constitutional rights that you're going to be giving up. You have a right to a public and speedy trial by a jury of 12 people who in order to convict you would have to find you unanimously guilty. That would mean all the members of the jury would need [to] find you guilty before you could be convicted of the charge. You would also have a right to confront any witnesses who would appear at trial and testify against you. That would give you the right to see them, hear them, question and cross-examine them. You also have a right to require witnesses to appear at trial and testify on your behalf.

At the trial of this cause the State of Nebraska is required to prove beyond a reasonable doubt that you committed the offense charged before you could be convicted of that offense. And at the trial of this action, I would advise the jury that you're presumed to be innocent and that presumption remains with you unless or until the State has proven you guilty beyond a reasonable doubt.

Further, sir, you could not be compelled to make a statement or testify against yourself at any trial or hearing in this matter, but you may remain silent.

You're also entitled to be represented by an attorney at all stages of this criminal proceeding which includes a trial and an appeal. And if you can't afford an attorney now or at a later time, I would appoint one to represent you at no charge. Do you understand that you have those rights as I've explained them to you . . . ?

[Davis]: Yes.

THE COURT: Do you understand that by offering a plea of no contest, if I accept it, you'll be giving up those rights because there won't be a jury trial where you could raise them?

[Davis]: Yes.

THE COURT: You also understand that if you were to take your case to trial and if you were found guilty that you could appeal your conviction in this matter to the Nebraska Court of Appeals or the Nebraska Supreme Court?

[Davis]: Yes.

After the factual basis was recited by the State, the district court accepted Davis' no contest plea and found him guilty. The district court sentenced Davis to 15 to 20 years' imprisonment. In case No. A-10-661, Davis, through his same counsel, timely filed a direct appeal to this court, alleging excessive sentence as the sole assignment of error. On October 29, 2010, this court summarily affirmed Davis' conviction and sentence.

On February 9, 2011, Davis filed a motion for postconviction relief alleging that his plea was entered involuntarily and that he received ineffective assistance of trial and appellate

counsel. On February 15, the district court entered an order directing the State to respond to Davis' postconviction motion within 45 days. When no responsive pleading was filed by the State, Davis filed motions for default judgment on April 25 and May 25. The State filed its motion to dismiss Davis' motion for postconviction relief on July 19. While the matter was still pending, Davis filed a request for ruling on his previously filed motions for default judgment and sought a writ of mandamus to compel the clerk of the district court to enter default judgment.

On October 14, 2011, the district court entered an order denying Davis' motion for postconviction relief without an evidentiary hearing. On October 17, the court denied Davis' motion for writ of mandamus, and on November 3, the court, at Davis' request due to concerns regarding having a final order, denied Davis' motion for default judgment, although the court noted that it clearly did not grant Davis' motion for default judgment at the time that it denied Davis' motion for postconviction relief. On November 4, Davis timely appealed to this court, and pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

III. ASSIGNMENTS OF ERROR

On appeal, Davis' assigned errors can be consolidated into the following issues: The district court erred in (1) denying his motion for a default judgment and (2) denying his motion for postconviction relief without an evidentiary hearing.

IV. STANDARD OF REVIEW

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010). However, an evidentiary hearing may be denied when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010); *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

V. ANALYSIS

1. DENIAL OF MOTION FOR DEFAULT JUDGMENT

In his first assignment of error, Davis contends that the district court erred in overruling his motions for default judgment after the State failed to respond to his postconviction motion within 45 days as ordered by the court. On February 15, 2011, the district court ordered the State to respond to Davis' postconviction motion within 45 days; however, the State did not file its motion to dismiss Davis' motion for postconviction relief until July 19.

Whether default judgment should be entered because of a party's failure to timely respond to a petition rests within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify reversal on such ground. *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). Although the record before this court discloses no reason for the delay in the State's response, the delay did not prejudice Davis, and we can see no abuse of

discretion in the district court's denial of Davis' motions for default judgment. Consequently, we find that this assigned error is without merit.

2. DENIAL OF MOTION FOR POSTCONVICTION RELIEF WITHOUT EVIDENTIARY HEARING

Secondly, Davis contends that the district court erred in denying his motion for postconviction relief without an evidentiary hearing because (a) trial counsel was ineffective for (i) failing to object or move to allow Davis to withdraw his no contest plea after the district court incorrectly advised him that he would be waiving his right to be represented by an attorney on appeal by pleading no contest; (ii) failing to properly investigate the case, retain experts, and/or conduct discovery; (iii) failing to consult with Davis on critical aspects of the case; (iv) failing to file a motion to suppress statements that were allegedly obtained in violation of Davis' constitutional rights; and (v) failing to object to false and improper statements made by the prosecution at sentencing and (b) appellate counsel was ineffective for failing to raise these claims on direct appeal.

In the instant case, the same attorney represented Davis at trial and on direct appeal, making this postconviction action his first opportunity to raise his claims of ineffective assistance of counsel. See *State v. Biloff*, 18 Neb. App. 215, 778 N.W.2d 497 (2009) (where defendant was represented by same lawyer at trial and on direct appeal, his motion for postconviction relief was first opportunity to assert ineffective assistance of counsel).

In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.*

In the instant case, Davis entered a no contest plea pursuant to a plea agreement. In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *Id.* Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *Id.* The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.*

(a) Allegations of Ineffectiveness of Trial Counsel

(i) *Incorrect Advisement by Trial Court*

Davis contends that his trial counsel was ineffective for failing to object or move to allow Davis to withdraw his no contest plea after the district court incorrectly advised him that he would be waiving his right to be represented by an attorney on appeal by pleading no contest. A criminal defendant retains his constitutional right to counsel after entering a plea of guilty or no contest because the right is not restricted to an actual trial on the merits. *State v. Paul*, 256 Neb.

669, 592 N.W.2d 148 (1999). A guilty or no contest plea does not waive the right to counsel during the “critical stages” of criminal proceedings, including pleading, sentencing, and direct appeal. See *id.*

Despite the incorrect advisement that he would be giving up his right to be represented by an attorney if he pled no contest, Davis cannot establish prejudice because, had counsel objected to the improper advisement and moved to withdraw Davis’ plea, the court would have clarified the advisement that, even if he entered a plea, Davis retained the right to counsel for sentencing and direct appeal. Additionally, Davis’ subsequent discovery that he did not give up his right to counsel by entry of his plea, but retained the right to counsel following his plea, was beneficial to him, not prejudicial.

Additionally, the record reflects that Davis was, in fact, represented by counsel at all critical stages of the proceedings including his plea, sentencing, and direct appeal. See, *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009) (court’s failure to inform defendant of his right to counsel should he choose to go to trial was not error where record reflected that defendant had benefit of counsel at his plea hearing and during prior proceedings); *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214 (1991) (county court’s failure to specifically inform defendant of his right to counsel at time of his entry of no contest plea was not error where defendant was represented by counsel throughout proceedings, including at suppression hearing, plea hearing, and sentencing, and thus, could conclude that defendant was aware of his right to counsel). Thus, Davis cannot establish prejudice from trial counsel’s failure to object or move to allow Davis to withdraw his no contest plea after the district court incorrectly advised him that he would be waiving his right to be represented by an attorney on appeal by pleading no contest.

*(ii) Failure to Properly Investigate, Retain Experts,
and/or Conduct Discovery*

Davis also contends that trial counsel was ineffective for failing to properly investigate the case, retain experts, and/or conduct discovery. Specifically, Davis asserts that trial counsel was ineffective for failing to investigate his case before advising him to plead no contest; for failing to conduct a proper investigation of police reports or to interview witnesses; for failing to obtain and preserve physical, documentary, or other evidence exculpatory to Davis, i.e., medical reports of the victim, surveillance photographs, and/or video of the crime scene on the date of the alleged incident; and for failing to use experts to explore forensic, psychiatric, or other issues material to the case, i.e., the victim’s injury, the victim’s mental illness (seizures), and Davis’ mental state while high on PCP. However, these allegations are merely conclusions with no specificity regarding what exculpatory evidence would have been uncovered.

In order to receive an evidentiary hearing for postconviction relief, a defendant is required to make specific allegations instead of mere conclusions of fact or law. *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010). In the absence of specific allegations, a trial court need not conduct a discovery hearing to determine if there exists anywhere in the world some evidence favorable to the defendant’s case. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). In assessing postconviction claims that trial counsel was ineffective in failing to call a particular witness or adduce evidence favorable to the defendant, the trial court need not conduct an evidentiary hearing where the postconviction motion does not include specific allegations

regarding what witnesses could have been procured, the testimony the witness would have given if called, or the evidence that should have been adduced. See, *id.*; *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), *disapproved on other grounds*, *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

We agree with the observations contained in the State's brief:

Davis asserts that trial counsel did not attempt to learn all of the facts of his case prior to the plea, but he fails to list a single fact that counsel overlooked. He claims that trial counsel failed to conduct a proper investigation of police reports, but doesn't . . . mention what pieces of evidence his counsel missed or how their discovery would have impacted the case. Davis contends that trial counsel failed to interview witnesses and obtain experts, but he doesn't name who those witnesses were or what their testimony would have been. He claims that trial counsel should have obtained copies of the victim's medical reports and surveillance footage from the crime scene, but he fails to state what exculpatory evidence was contained therein.

Brief for appellee at 9-10. Because Davis' claims contain only conclusions of fact or law, the district court did not err in concluding that no evidentiary hearing was required.

(iii) Failing to Consult

Davis contends that trial counsel was ineffective for failing to consult with Davis on critical aspects of the case, specifically "calling or not calling witnesses, theory of the defense and final argument." Davis admits that these are strategic decisions. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004). Whether or not to call witnesses, defense theory, and final argument are all trial strategies, and since Davis waived his right to trial by pleading no contest, there was no reason for counsel to consult with him on these issues and Davis cannot establish either deficient performance or prejudice.

(iv) Failing to File Motion to Suppress

Davis contends that trial counsel was ineffective for failing to file a motion to suppress statements that were allegedly obtained in violation of Davis' constitutional rights. Davis alleges that counsel "was aware" that Davis' statement was obtained in violation of his constitutional rights because Davis did not sign the rights advisory form establishing that he understood his rights and was willing to talk to law enforcement officers. These conclusions are insufficient in and of themselves to support postconviction relief.

Additionally, Davis does not make any allegations as to the nature of the statements made, nor whether anything contained in the statements was incriminating. Further, the State did not rely on any statement by Davis in establishing the factual basis for the offense. Thus, Davis was not prejudiced by counsel's failure to file a motion to suppress his statements.

(v) Failing to Object to Statements at Sentencing

Davis contends that trial counsel was ineffective for failing to object to false and improper statements made by the prosecution at sentencing regarding Davis' alleged history of domestic violence. The State argued at sentencing that although Davis blamed his violent

behavior over the prior 2 years on drug and alcohol abuse, his record showed that he had been committing crimes of domestic violence against other victims for longer than that and that Davis moves from victim to victim. At sentencing, the State also referenced evidence related to the terroristic threats charge, which had been dismissed as part of the plea agreement.

Despite Davis' claim that trial counsel failed to object to the State's comments at sentencing, the record reflects that trial counsel made the following comments:

[Defense counsel]: Your Honor, I just feel I need to respond to one thing, if I may, and that is the implication that I misrepresented my client's record. If you look at his record and you look at the domestic violence charges on his record, and I did misrepresent it in this way: It's two years, one and a half months between the first domestic violence incident on his record and the current case and his arrest for that. The implication that I was somehow misrepresenting that within the last two years of doing this wet that's when it's been happening --

THE COURT: I didn't hear that.

[Defense counsel]: Well, I just wanted to make it clear.

Thus, Davis' counsel did respond to the State's comments regarding his prior domestic violence history.

Davis also contends that trial counsel was ineffective for failing to object to the statements relating to the evidence regarding the terroristic threats charge, which had been dismissed as part of the plea agreement. However, any objection to these statements would not have been sustained. The sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). A sentencing court in noncapital cases may consider a defendant's unadjudicated misconduct in determining an appropriate sentence, *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998), and a sentencing court's consideration of dismissed charges has been upheld as an appropriate factor to consider in arriving at the sentence to be imposed on the defendant. See, *State v. Rose*, 183 Neb. 809, 812, 164 N.W.2d 646, 649 (1969) ("[i]t is true that many of the arrests did not lead to a conviction of crime, but they are no less proper to be considered in arriving at the sentence to be imposed"); *State v. Thomas*, 6 Neb. App. 510, 574 N.W.2d 542 (1998) (sentencing court did not abuse its discretion in considering dismissed charges when determining sentence to be imposed on defendant). Thus, the district court properly determined that this allegation lacked merit and no evidentiary hearing was needed.

(b) Allegations of Ineffectiveness of Appellate Counsel

Davis contends that appellate counsel was ineffective for failing to raise the aforementioned claims on direct appeal. When a case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). Obviously, if trial counsel was not ineffective, then the petitioner suffered no prejudice when appellate counsel

failed to bring an ineffective assistance of trial counsel claim. *Id.* Having found that the district court properly determined that Davis' claims of ineffective assistance of trial counsel were without merit and did not require an evidentiary hearing, it follows that appellate counsel was not ineffective for failing to raise the aforementioned issues on direct appeal. Thus, the trial court properly found that Davis' claim of ineffective assistance of appellate counsel was without merit and an evidentiary hearing was not required.

VI. CONCLUSION

Having considered and rejected Davis' assigned errors, we affirm the decision of the district court dismissing Davis' motion for postconviction relief without an evidentiary hearing.

AFFIRMED.